

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.

In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords III)**

**Docket No. 16-CRB-0003-PR
(2018-2022) (Remand)**

**SERVICES' MOTION TO STRIKE
COPYRIGHT OWNERS' EXPERT TESTIMONY**

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Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the “Services”) respectfully submit this motion to strike portions of the Copyright Owners’ expert remand testimony.

INTRODUCTION

The Copyright Owners chose to submit no new evidence or expert testimony in support of their written direct remand statement. They argued—incorrectly—that the sole evidentiary question before the Judges on remand is whether the uncapped Total Cost of Content (“TCC”) prong had caused “substantial, immediate and irreversible” disruption to the Services “in the short-run,” but they offered no evidence supporting their contention that no such disruption had occurred. Copyright Owners’ Opening Br. at 55-56 (Apr. 1, 2021) (citation omitted). As the Services explained in their reply brief, the Copyright Owners’ argument misreads the D.C. Circuit’s decision, the Final Determination, and the Copyright Act, all of which require the Judges on remand to determine rate levels and a rate structure that are reasonable and satisfy *all four* Section 801(b)(1) factors.

The Copyright Owners’ written rebuttal remand submission retained the same incorrect position concerning the reopened record, yet, in contrast to their opening submission, it included *nearly 300 pages* of expert testimony. Much of that new evidence does not respond to anything the Services submitted, but instead attempts to support arguments the Copyright Owners raised in their written direct remand submission. This is not an appropriate use of rebuttal testimony. For rebuttal testimony to stand, it must “*rebut* the arguments and evidence proffered by the adverse parties.” Order Denying Motion for Rehearing at 3, *Distribution of 2000-2003 Cable Royalty Funds* (2000-03 CD), No. 2008-2 CRB CD 2000-2003 (Phase II) (Aug. 7, 2013) (2000-03 CD Order). The new expert testimony challenged here fails to meet that standard.

First, the bulk of Dr. Jeffrey Eisenach’s testimony is meant to support the Copyright Owners’ argument that the Final Determination was not disruptive to the Services’ businesses and the streaming industry. To that end, he conducts analyses using data and information that the Copyright Owners obtained from the Mechanical Licensing Collective (“MLC”) outside of these remand proceedings and that were available to them well before the direct submissions.¹ This testimony is not rebuttal—the Copyright Owners could (and should) have supplied Dr. Eisenach’s analyses with their written direct remand submission.

Second, Professor Daniel Spulber’s written remand testimony largely discusses economic theory purporting to validate the Majority’s “heroic assumption” that raising mechanical rates would not cause the Services any harm because record labels would voluntarily reduce sound

¹ The Copyright Owners have claimed that the interim regulation codified at 37 C.F.R. § 210.34(c)(4) authorized them to obtain this confidential information from the non-party MLC by request and without providing notice and an opportunity to object to the parties that submitted the information to the MLC. Indeed, it appears that the Copyright Owners believe they are free to obtain any confidential information from the MLC for use in this or any other legal proceeding simply by requesting it. Had the Copyright Owners instead proceeded through the standard approach of serving a subpoena on a non-party, other parties to the proceeding and, in particular, those entities whose confidential information is being sought, would have had notice of the request, the opportunity to object, and access to any information acquired. The Copyright Owners’ interpretation is particularly problematic as their counsel also represents the MLC. All of this is at odds with standard litigation practice, including as codified in the regulations governing Board proceedings and in the Federal Rules of Civil Procedure. *See, e.g.*, 17 U.S.C. § 803(b)(6)(C)(ix) (requiring a subpoena or request from the Judges to obtain discovery from non-parties, and only in limited circumstances); *Copyright Royalty Judges’ Authority to Subpoena a Nonparticipant to Appear and Give Testimony or to Produce and Permit Inspection of Documents or Tangible Things*, 75 Fed. Reg. 13,306, 13,308-10 (Mar. 19, 2010) (Register of Copyrights analyzing same); Fed. R. Civ. P. 34(c), 45 (requiring a court-issued subpoena before compelling discovery from non-parties). While the Services are not moving to strike Dr. Eisenach’s testimony on the grounds that these data were inappropriately obtained—though the Copyright Owners’ access to these data undermines many of the claims they had raised in their motion to compel—the Services bring the Copyright Owners’ interpretation of Section 210.34(c)(4) to the Judges’ attention as the Services, whose confidential information is at issue, should be entitled to know of and, if appropriate, object to the disclosure of their confidential information to other parties.

recording royalties in response and “accept millions of dollars in lost revenue.” *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phono III)*, Final Rule, 84 Fed. Reg. 1918, 1966 (Feb. 5, 2019) (Dissent) (cleaned up). This too is not rebuttal. It is unmistakably an effort to support the Copyright Owners’ affirmative argument, made in their opening submission, that this theory has validity. It too could and should have been included with the Copyright Owners’ written direct remand submission.

Finally, the Copyright Owners offer portions of Professor Richard Watt’s written remand testimony to support their proposal to restore the Final Determination. Professor Watt purports to summarize the application of bargaining theory in the Final Determination, concluding that he agrees with his own characterization of the Majority’s use of that theory. Worse still, Professor Watt tries to bootstrap the credibility of Dr. Eisenach’s improper rebuttal testimony by relying on that testimony and claiming that it supports his Nash bargaining model. This is not an appropriate use of rebuttal testimony. If the Copyright Owners wanted to offer such testimony, they should have done so at the direct statement phase of these remand proceedings.

The Copyright Owners originally requested that the remand be structured to require the Services to present their evidence first and permit the Copyright Owners to present their evidence second, with no opportunity for the Services to respond. Though the Judges denied that request, the Copyright Owners have engaged in self-help and acted as though their proposed remand structure was adopted. By withholding their expert testimony until their rebuttal submission, the Copyright Owners have ignored the Judges’ ruling, and they have manipulated the procedures in these remand proceedings to deny the Services any opportunity to critique and respond to misleading expert testimony that the Copyright Owners claim supports positions

articulated in their direct remand submission. The Copyright Owners have also denied the Judges a complete and accurate record on which to make a reasoned determination.

The Judges should strike the Copyright Owners’ improper “rebuttal” testimony from the record, along with the portions of the Copyright Owners’ reply brief that rely on that testimony. While the Services ask, in the alternative, that the Judges allow the Services to submit surrebuttal testimony and a surreply brief so that the Judges can have a complete record, this alternative remedy will not fully cure the prejudice caused by the Copyright Owners’ gamesmanship. By failing to adhere to the Judges’ schedule, the Copyright Owners have needlessly prolonged this remand proceeding and the period during which the parties will be uncertain of the royalties that will be due, while burdening the Services with drafting, and the Judges with reviewing and ruling on, this Motion and an additional round of briefing.

ARGUMENT

“As should be clear from their names, . . . the ‘written *direct* statement’ and the ‘written *rebuttal* statement’ serve different functions in the adjudication” of royalty rates and terms. *2000-03 CD* Order at 3. The Copyright Act defines “written direct statements” as “witness statements, testimony, and exhibits to be presented in the proceedings, and such other information *that is necessary to establish terms and rates.*” 17 U.S.C. § 803(b)(6)(C)(ii)(II) (emphasis added). Likewise, the Judges’ rules indicate that “[t]he written direct statement shall include *all testimony.*” 37 C.F.R. § 351.4(b) (emphasis added).² In other words, “[t]he written direct statement is a participant’s opportunity to set forth the arguments and evidence it intends to rely upon in establishing” its own proposal. *2000-03 CD* Order at 3. Thus, the Copyright

² Although the statute and the rules refer to “written direct statements” and “written rebuttal statements,” as opposed to remand statements, there is no reason for different standards to apply to remand proceedings in which the Judges established comparable direct and rebuttal phases.

Owners were “required to present the information necessary to establish their proposed” royalty rates and terms “(*i.e.*, their direct case) in their written direct statement.” *Id.*; *see also Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1118 (D.C. Cir. 2015) (“It should be no surprise that a requirement that a party present in its initial direct statement ‘all testimony’ necessary to establish its claimed entitlement to royalties would obligate the party to include in that statement the testimony applying its proposed methodology to the case at hand.”).

By contrast, “[t]he written rebuttal statement is a participant’s opportunity to set forth the counter-arguments and evidence it intends to offer to *rebut* the arguments and evidence proffered by the adverse parties in the proceeding.” 2000-03 CD Order at 3. Rebuttal testimony cannot be used to bolster or amend a participant’s own direct submission or belatedly offer new evidence in support of a participant’s own rate proposal. *See* 2000-03 CD Order at 3-5 (striking rebuttal testimony that “was a required element of the [Settling Devotional Claimants’] direct case”); Order Granting in Part and Denying in Part Music Choice’s Motion To Strike at 2, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, No. 2011-1 CRB PSS/Satellite II (Aug. 3, 2012) (*SDARS II* Order) (striking rebuttal testimony that was “nothing more than an untimely addition to [witness’s] written direct testimony”); *Settling Devotional Claimants*, 797 F.3d at 1118 (“Nor do the rules provide any reason to think that this weighty evidence may be saved for the rebuttal case.”). It must be limited to “responding to issues raised in the direct testimony of witnesses for the party opposite.” *SDARS II* Order at 2.

The Copyright Owners’ belated evidentiary dump does not meet these clear and established standards. By failing to submit *any* evidence in support of their direct-phase submission and rate proposal until their rebuttal case, the Copyright Owners “engaged in trial by

ambush, in violation of the letter and spirit of the Judges’ procedural rules,” and prejudiced the Services, who now have no opportunity to respond to the voluminous and erroneous testimony that the Copyright Owners have offered on remand. *Distribution of the 2000, 2001, 2002 and 2003 Cable Royalty Funds (2000-03 CD)*, Final Rule, 78 Fed. Reg. 64,984, 65,004 (Oct. 30, 2013). This “‘gamesmanship’ interferes with the Judges’ need for a comprehensive record.” Order Denying Licensee Services’ Motion to Strike SoundExchange’s “Corrected” Written Rebuttal Testimony at 11, *Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings*, No. 14-CRB-0001-WR (2016-2020) (Apr. 2, 2015). And while this testimony should be struck, if the Judges allow this testimony to remain in the record without affording the Services any opportunity to respond, the Services will be “procedurally blindsided” once again. *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 381 (D.C. Cir. 2020).

As noted above, the Copyright Owners proposed a schedule for this remand proceeding that would have required only the Services to file “an initial submission,” and then allowed the Copyright Owners to “reply to that submission.” Proposal of Copyright Owners for the Conduct and Schedule of the Remand at 6, *Phono III*, No. 16-CRB-0003-PR (2018-2022), eCRB Doc. No. 23387 (Dec. 10, 2020). The Judges rejected the Copyright Owners’ proposed schedule, which would have given the Copyright Owners an opportunity to respond to the Services’ arguments while depriving the Services of any opportunity to respond to the Copyright Owners’ arguments. Instead, the Judges found it “appropriate to accept submissions from *both parties* stating the affirmative cases for their respective positions and providing evidence therefor, followed by rebuttal submissions from the parties.” Order Regarding Proceedings on Remand at 2, *Phono III*, No. 16-CRB-0003-PR (2018-2022), eCRB Doc. No. 23390 (Dec. 15, 2020)

(emphasis added). This Order and the rules required the Copyright Owners to include any and all evidence supporting their “affirmative case” in their initial submission. By waiting to submit that evidence until rebuttal, the Copyright Owners have flouted the Judges’ Order and, in effect, put in place their own preferred schedule.

I. Dr. Eisenach’s Testimony Is Not Offered for Rebuttal

Dr. Eisenach’s testimony is clearly meant to bolster the Copyright Owners’ proposal in their written direct remand submission—*i.e.*, that the Judges readopt the rate levels and structure in the vacated Final Determination. In that submission, the Copyright Owners argued that the Final Determination had not caused substantial, short-term disruption to the Services’ businesses and the streaming industry, and thus, they argued that the Judges should readopt the vacated rate levels and structure. *See, e.g.*, Copyright Owners’ Opening Br. at 55-68. Dr. Eisenach’s written “rebuttal” testimony is a transparent effort to support that argument. He repeatedly tries to demonstrate that the Final Determination has “not had a disruptive impact on any Service, let alone the streaming service industry.” Remand Written Rebuttal Testimony of Jeffrey A. Eisenach ¶ 6 (Eisenach Testimony). This testimony is “nothing more than an untimely addition” to the Copyright Owners’ written direct remand statement and, accordingly, should be stricken. *SDARS II* Order at 2.

Dr. Eisenach first seeks to support the Copyright Owners’ argument in their written direct remand submission that raising mechanical rates would not be disruptive by arguing that “

[REDACTED]

[REDACTED]

[REDACTED]. Eisenach Testimony ¶¶ 8-43 & app. C. He then attempts to demonstrate that “the Phonorecords III rates have not had an adverse impact on the Services[’] financial performance.” *Id.* ¶¶ 44-62. But the Copyright Owners were required to “set forth the

arguments and evidence [they] intend[ed] to rely upon” to support their own remand proposal *in their written direct submission*. See 2000-03 CD Order at 3-5. Rebuttal testimony is not the appropriate mechanism for introducing this type of affirmative evidence into the record. See *id.*; *SDARS II* Order at 2; *Settling Devotional Claimants*, 797 F.3d at 1118.

Although Dr. Eisenach tries to dress up his analyses as responses to “the Services’ and Service Experts’ contentions about the impact of the Phonorecords III Rates on royalty rates and market performance,” Eisenach Testimony ¶ 7, the Copyright Owners argue in their rebuttal submission that the Services have “provided no evidence of harm or disruption, or indeed, of any economic impact” resulting from the Final Determination, Copyright Owners’ Reply Br. at 35-36 (July 2, 2021). Dr. Eisenach cannot be responding to the Services’ contentions about the disruptive impact of the Final Determination if, as the Copyright Owners assert, the Services never made those contentions in the first place. This contradiction underscores that Dr. Eisenach’s testimony is not rebuttal.

Had the Copyright Owners included Dr. Eisenach’s testimony with their written direct submission, the Services would have had an opportunity to point out the many problems with Dr. Eisenach’s analysis in their rebuttal filing. The Copyright Owners also easily could (and *should*) have provided Dr. Eisenach’s analyses in that initial submission. Dr. Eisenach takes all of his data from documents that the Copyright Owners obtained from the MLC (from outside of these remand proceedings) and publicly available information, all of which was available to them well in advance of the direct filing. See Eisenach Testimony ¶ 13 n.19 & ¶ 44.³ Thus, Dr. Eisenach

³ As noted above in footnote 1, the Copyright Owners did not follow the appropriate procedures when they obtained documents from the MLC. Dr. Eisenach also relied on certain [REDACTED]. Eisenach Testimony ¶ 82 & tbl. 3. While he never states how he acquired these data, presumably they were provided to him by one of the NMPA member publishers.

could have conducted these analyses before the parties submitted their written direct remand submissions. “This delay and eleventh-hour submission” demonstrates that the Copyright Owners are trying to “engage[] in ‘trial by ambush.’” *2000-03 CD Order* at 5.

Dr. Eisenach also attempts to establish that the Final Determination’s uncapped TCC prong “has served its intended purpose by protecting Copyright Owners against revenue diminution and anomalous reporting practices.” Eisenach Testimony ¶¶ 63-89. Though he makes nominal references to “the Services’ own rate proposals” in this discussion, *id.* ¶ 64, the Copyright Owners made the *exact same arguments* that Dr. Eisenach is making now in their opening brief—they argued that the Majority adopted the uncapped TCC prong “to provide protection against revenue deferment and displacement,” Copyright Owners’ Opening Br. at 38. And because Dr. Eisenach’s analysis is once again entirely based on information from the MLC, he easily could have performed it before the Copyright Owners filed their written direct remand submission. Thus, Dr. Eisenach’s analysis of the uncapped TCC prong is another “untimely addition” to the Copyright Owners’ own affirmative case, rather than proper rebuttal testimony. *See SDARS II Order* at 2; *see also 2000-03 CD Order* at 3-5; *Settling Devotional Claimants*, 797 F.3d at 1118.

Had the Copyright Owners included Dr. Eisenach’s testimony in their written direct remand submission, when it properly was due, the Services would have had nearly three months to review his analyses, consult with their experts, and respond to his contentions in their rebuttal submission. But the Copyright Owners deprived the Services of that opportunity—and deprived the Judges of a complete record—by withholding Dr. Eisenach’s testimony until the end. Therefore, the Judges should strike paragraphs 8-89 and Appendix C of Dr. Eisenach’s remand testimony from the record as improper rebuttal. *See 2000-03 CD Order* at 3-5; *2000-03 CD*, 78

Fed. Reg. at 65,004. The Judges should also strike pages 40-41, 43-46, and 57-58 of the Copyright Owners’ reply brief, which rely on that improper testimony.

II. Professor Spulber’s Testimony Is Not Offered for Rebuttal

Professor Spulber’s testimony is yet another attempt to support the Copyright Owners’ proposition that the Judges should “readopt the same rates and terms set forth in the Final Determination,” Copyright Owners’ Opening Br. at 92, rather than a response to the Services’ written direct remand statement. In fact, as the Copyright Owners themselves admit, they have offered Professor Spulber’s testimony to show “why the reasoning of the Board was correct on the ‘see-saw’ question,” attempting to bolster an argument they made in their opening submission. Summary of Copyright Owners’ Remand Written Rebuttal Testimony at 2. His testimony attempts to do so without trying to challenge, discredit, or disprove the Services’ direct testimony, as proper rebuttal would. Instead, Professor Spulber’s testimony belatedly seeks to fill the void left by the Copyright Owners’ decision to submit no affirmative evidence in the direct phase by “support[ing] and further explain[ing] judgments of the Board on bargaining theory in the Final Determination.” Remand Written Rebuttal Testimony of Daniel Spulber ¶ 7 (Spulber Testimony); *see also id.* ¶¶ 4, 6, 14, 51-52. As a result, this testimony “stray[s] so far from focusing on the subject[s]” presented in the Services’ written direct remand statement that the Judges must strike it as improper rebuttal testimony. *See SDARS II* Order at 2.

First, in Part II of his remand testimony, Professor Spulber addresses an unremarkable and uncontested point—that sound recording licenses “are determined through negotiation.” Spulber Testimony ¶¶ 10-17. Nothing prevented Professor Spulber from making this point in the Copyright Owners’ written direct remand submission. And more important, it is not rebutting anything—none of the Services’ witnesses expressed a contrary view. Recognizing that he cannot identify any issues in the Services’ direct testimony to rebut, Professor Spulber instead

acknowledges that he is discussing an “obvious fact.” Spulber Testimony ¶ 10. But this acknowledgement does not legitimize his improper rebuttal testimony. Professor Spulber then concludes Part II of his testimony by speculating that sound recording negotiations “will consider the compulsory royalty rate for Copyright Owners.” Spulber Testimony ¶ 17. This is a factual assertion for which he has no basis.

Next, in portions of Part III of his remand testimony (paragraphs 18-27), Professor Spulber asserts that “general principles of the economics of bargaining” supposedly show that “we would expect to see a decrease in sound recording royalty rates” following “an increase in the compulsory license rate.” Spulber Testimony ¶¶ 18, 26. This is an effort to prop up the see-saw theory that the Majority used to rationalize its dramatic increases in the mechanical rate levels and its new rate structure. Indeed, the self-avowed purpose of this analysis is to “support[] the reasoning of the Board regarding how regulated musical work royalties relate to negotiated royalties.” Spulber Testimony ¶ 18. That is not rebuttal, but instead support for the Copyright Owners’ affirmative position (expressed in its direct submission) that the see-saw theory on which the Majority relied is valid and is “not just theoretical.” Copyright Owners’ Opening Br. at 65-67, 92. And much like Part II, this discussion is not offered in response to the testimony of any of the Services’ witnesses—Professor Spulber does not even attempt to identify any issues in the Services’ testimony that he purports to rebut.

Finally, Part IV of Professor Spulber’s testimony is also an effort to bolster the Copyright Owners’ direct case. *See* Spulber Testimony ¶¶ 53-71. There, he purports to show “that the record companies are not a complementary oligopoly.” Spulber Testimony ¶ 56. The Copyright Owners took this *same position* in their written direct remand statement, asserting (incorrectly and contrary to Judges’ consistent finding across numerous proceedings) that “evidence in the

record refutes the Services’ arguments” that “the major record labels have unchecked market power” and constitute a “complementary oligopoly.” Copyright Owners’ Opening Br. at 60. *But see, e.g., Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, Final Rule, 81 Fed. Reg. 26,316, 26,335, 26,368 (May 2, 2016); Initial Determination at 6-12, 66-71, *Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies To Facilitate Those Performances (Web V)*, No. 19-CRB-0005-WR (2021-2025), eCRB Doc. No. 25329 (June 11, 2021). If the Copyright Owners wanted to try to support that assertion with expert testimony, they could (and should) have submitted Professor Spulber’s analysis with their written direct remand submission when the Services would have had a scheduled opportunity to respond. Instead, they saved Professor Spulber’s testimony for the rebuttal phase in an effort to prevent the Services from doing so.

Moreover, the issue of whether record companies constitute a complementary oligopoly is not even open for debate on remand. In the Final Determination, both the Majority and the Dissent recognized that the record labels have substantial complementary oligopoly power over the Services, and the D.C. Circuit agreed on appeal. *See Phono III*, 84 Fed. Reg. at 1933, 1940, 1952-53; *Phono III*, 84 Fed. Reg. at 1964, 2005-06 (Dissent); *Johnson*, 969 F.3d at 372. Because the Copyright Owners chose not to challenge this determination in their appeal, it is “inappropriate to consider” the issue again at this stage. *Nw. Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989); *see Services’ Joint Reply Brief* at 48-50.⁴ Written rebuttal testimony is an

⁴ Professor Spulber contends that the Services’ experts “reference” the complementary oligopoly power of the major labels in their testimony. *See Spulber Testimony* ¶ 53. But the “references” Professor Spulber identifies are merely instances in which the Services’ experts repeat *the Judges’* finding (and D.C. Circuit’s affirmance) and appropriately take it as law of the case—not something for which they provide additional affirmative testimony to be rebutted. *See Katz*

“opportunity to set forth the counter-arguments and evidence [a party] intends to offer to *rebut* the arguments and evidence *proffered by the adverse parties* in the proceeding.” 2000-03 CD Order at 3 (second emphasis added). It is not an opportunity to challenge previous holdings by the Judges that the Copyright Owners failed to press on appeal and therefore waived.

Because paragraphs 10-27 and 53-71 of Professor Spulber’s remand testimony merely attempt to bolster the Copyright Owners’ direct case, and fail to challenge anything in the Services’ remand proposal, those paragraphs are not proper rebuttal. *See* 2000-03 CD Order at 3-5; *SDARS II* Order at 2; *Settling Devotional Claimants*, 797 F.3d at 1118. Thus, the Judges should strike paragraphs 10-27 and 53-71 of Professor Spulber’s testimony. The Judges should also strike page 57 of the Copyright Owners’ reply brief, which relies on that improper testimony.

III. Professor Watt’s Testimony Is Not Offered for Rebuttal

The flaws in Professor Watt’s testimony are just a different verse of the same song. Rather than respond to the Services’ arguments on remand, portions of Professor Watt’s rebuttal testimony merely repeat the Copyright Owners’ legal argument in its written direct remand submission that the Judges should readopt the same rates and terms from the Final Determination. *See, e.g.*, Summary of Copyright Owners’ Remand Written Rebuttal Testimony at 3 (explaining that Professor Watt opines that “the Board’s reasoning on bargaining theory is sound,” regardless of any see-saw effects).

WDRT ¶ 53 (“As the Judges recognized, the major recording companies constitute a complementary oligopoly”); Marx WDRT ¶ 39 (similar); Leonard WDRT ¶ 13 (similar). These references to the Judges’ finding do not transform Professor Spulber’s testimony into rebuttal.

Parts IV(A)-(B) of Professor Watt’s remand testimony simply state his view of what the Majority said in the vacated Final Determination regarding the impact of the musical works rate on the streaming market, before summarily concluding that the “Board’s analysis correctly reflected Nash bargaining principles.” Remand Written Rebuttal Testimony of Richard Watt at 10 (Watt Testimony). This testimony merely claims to summarize, and then attempts to prop up, the Majority’s application of bargaining theory in the Final Determination. In this portion of his testimony, Professor Watt provides his understanding of the vacated Final Determination and attempts to describe the various concerns for which the Judges looked to bargaining theory and then concludes that, in his view, Nash bargaining theory addresses these concerns and that the Majority got it right in relying on his prior testimony. *See id.* ¶ 12 (“The Board’s statement of its concern here strikes me as very salient, as the Board is correctly applying bargaining theory insights to the right question.”). This self-serving testimony is untethered to the Services’ written direct remand testimony and should therefore be stricken as improper rebuttal testimony. *See SDARS II* Order at 2.

Additionally, Professor Watt offers improper rebuttal opinions meant to bolster the credibility of the Copyright Owners’ other witnesses rather than respond to the Services’ testimony. In paragraphs 42-46, Professor Watt claims to be taking on the Services’ contentions that “[REDACTED], but a closer examination shows that he is really just parroting Dr. Eisenach’s improper opinions, which, as noted above, could and should have been proffered as part of the Copyright Owners’ written direct remand case. *See supra* Point I. Indeed, Professor Watt admits that “the relevant analysis [on this point] has been carried out by Dr. Eisenach.” Watt Testimony ¶ 44. As discussed above, however, Dr. Eisenach’s analysis is merely an attempt to support the Copyright

Owners’ affirmative case that the drastically increased rate levels and novel rate structure that the Majority adopted were not disruptive. Similarly, Professor Watt improperly attempts to bolster the credibility of Dr. Eisenach’s empirical analysis of the changes in certain royalty rates over time. In Part XI(C) of his remand testimony, Professor Watt asserts that Dr. Leonard argued that an empirical analysis of the relationship between the statutory rate and the negotiated label rate was required, but that neither Dr. Leonard nor the Services provided such analysis. *Id.* ¶ 118. But Professor Watt goes beyond rebutting Dr. Leonard’s criticism to argue that, “as we see from Dr. Eisenach’s analysis, the actual evidence is completely consistent with the Nash bargaining model and the Board’s reasoning on that issue.” *Id.* ¶ 118 n.51. This is not appropriate rebuttal testimony—it is just another attempt to prop up Dr. Eisenach’s improper testimony.

Accordingly, the Judges should strike paragraphs 7-18 and 42-46 and footnote 51 of Professor Watt’s testimony as improper rebuttal. *See 2000-03 CD Order at 3-5; 2000-03 CD, 78 Fed. Reg. at 65,004.* The Judges should also strike pages 55-57 of the Copyright Owners’ reply brief, which rely on that improper testimony.

IV. If the Copyright Owners’ Improper Testimony Is Not Stricken, the Judges Should Allow the Services To Respond

As detailed above, the Copyright Owners improperly withheld all of the evidentiary support for their direct case until the rebuttal phase in an attempt to deprive the Services of any opportunity to respond. Allowing the Services to respond will not fully cure the prejudice the Copyright Owners have caused. Had the Copyright Owners submitted the testimony with their written direct remand submission, as the Scheduling Order required, the Services could have efficiently addressed it in conjunction with their reply brief. Instead, the Services have incurred the costs of drafting this motion and—if the Judges do not strike the testimony but permit a response—will have to incur the costs of drafting another submission and ensuring that their

experts are available to assist with that response. The effort will also divert time and resources away from preparing initial submissions for *Phonorecords IV*, while also delaying the resolution of this remand and increasing the period in which the parties lack certainty about the royalties that will be owed for the 2018 through 2022 period.

If the Judges do not strike the improper rebuttal testimony from the record in its entirety, the Judges should at a minimum allow the Services to submit surrebuttal testimony and a surreply brief addressing the many shortcomings in the Copyright Owners' expert testimony. A preliminary review of the improper testimony indicates that the Copyright Owners' experts have presented misleading arguments and analyses that, if allowed to stand, warrant a response. At a minimum, the following points merit clarification:

- The Copyright Owners' experts do not actually engage with the position that the Services and their experts took in their written direct remand submission—*i.e.*, that [REDACTED] Services' Joint Opening Br. at 48 (emphasis revised) (Apr. 1, 2021). Instead, they claim that [REDACTED] *See, e.g.*, Eisenach Testimony ¶ 6; Watt Testimony ¶ 42. Indeed, Dr. Eisenach discusses what he claims are [REDACTED]
- Dr. Eisenach presents incomplete and cherry-picked financial information that does not establish that the increase in mechanical royalties [REDACTED]. Nor does he show that the Service's total royalty obligations are compatible with a healthy music streaming market. For example, [REDACTED] *See, e.g.*, Eisenach Testimony ¶ 21 & app. C, tbl. C-1, at C-9 (AMU, Combined Royalty Rate, Columns 6-11). [REDACTED]

[REDACTED]. See *id.* app. C, tbl. C-1, at C-9 (AMU, Combined Royalty Rate) (Columns 3-5).

[REDACTED]. See *id.* app. C, tbl. C-1, at C-7 (AMU, Sound Recording Rate).

- Dr. Eisenach inappropriately combines categories of offerings in an effort to mask what has actually happened over time. For example, Dr. Eisenach claims that for [REDACTED] Eisenach Testimony ¶ 82. Dr. Eisenach engineers this conclusion by [REDACTED]

- Dr. Eisenach fails to account for factors other than the Final Determination that have impacted the Services' royalty rates over time. For example, [REDACTED]

- Dr. Eisenach also improperly cherry-picks financial data from specific time periods within the *Phonorecords II* period rather than using more comprehensive data sets. For instance, [REDACTED]

- [REDACTED]
- Professor Spulber’s abstract prediction that that sound recording negotiations “will consider the compulsory royalty rate for Copyright Owners,” Spulber Testimony ¶ 17, [REDACTED]
[REDACTED] See Services’ Joint Opening Br. at 47-50.
 - Professor Spulber’s assertion that the major record labels “are not a complementary oligopoly” because they “engage in negotiations” and “transact through contractual agreements,” Spulber Testimony ¶¶ 56, 61, 63, at best promotes hyper-technical abstract economic theory over reality, and, in any event, is directly at odds with the repeated findings of the Judges.

CONCLUSION

For the foregoing reasons, the Judges should strike from the record paragraphs 8-89 and Appendix C of the Remand Written Rebuttal Testimony of Jeffrey A. Eisenach, paragraphs 10-27 and 53-71 of the Remand Written Rebuttal Testimony of Daniel F. Spulber, and paragraphs 7-18 and 42-46 and footnote 51 of the Remand Written Rebuttal Testimony of Richard Watt, as well as pages 40-41, 43-46, and 55-58 of the Copyright Owners’ reply brief. In the alternative, the Judges should allow the Services to submit written surrebuttal testimony and a 20-page surreply brief in response to the Copyright Owners’ improper rebuttal submissions.

July 27, 2021

Respectfully submitted,

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**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.**

In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords III)**

**Docket No. 16-CRB-0003-PR
(2018-2022) (Remand)**

**DECLARATION AND CERTIFICATION OF AARON J. CURTIS
REGARDING RESTRICTED PROTECTED MATERIAL**

**(On behalf of Amazon.com Services LLC, Google LLC,
Pandora Media, LLC, and Spotify USA Inc.)**

1. I am counsel for Pandora Media, LLC in the above-captioned case. I respectfully submit this declaration and certification pursuant to the terms of the Protective Order issued July 27, 2016 (the “Protective Order”). I have prepared this declaration after consultation with counsel for Amazon.com Services LLC, Google LLC, and Spotify USA Inc. (collectively, with Pandora Media, LLC, the “Services”), and am authorized to submit this declaration on their behalf.

2. I have reviewed the Services’ Motion to Strike Copyright Owners’ Expert Testimony (the “Motion”). Portions of the Motion contain information that the Participants have designated as “Restricted” under the Protective Order (the “Protected Material”). The Protected Material is shaded in grey highlight in the restricted e-filing of the Motion, and is fully redacted in the public e-filing of the Motion.

3. The Protected Material includes testimony and legal argument involving (a) contracts and contractual terms (including the negotiation thereof) that are not available to the public, highly competitively sensitive and, at times, subject to express confidentiality provisions

with third parties; and (b) highly confidential internal business information, financial projections, financial data, negotiation correspondence, and competitive strategies that are proprietary, not available to the public, and commercially sensitive.

4. If this contractual, commercial, or financial information were to become public, it would place the Services at a commercial and competitive disadvantage, unfairly advantage other parties to the detriment of the Services, and jeopardize their business interests. Information related to confidential contracts or relationships with third-party content providers could be used by the Services' competitors, or by other content providers, to formulate rival bids, bid up Service payments, or otherwise unfairly jeopardize the Services' commercial and competitive interests.

5. The contractual, commercial, and financial information described in the paragraphs above must be treated as Restricted Protected Material in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling the Services to provide the Copyright Royalty Judges with the most complete record possible on which to base their determination in this proceeding.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information, and belief, the foregoing is true and correct.

Dated: July 27, 2021
New York, NY

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Proof of Delivery

I hereby certify that on Tuesday, July 27, 2021, I provided a true and correct copy of the Services' Motion to Strike Copyright Owners' Expert Testimony [Public] to the following:

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

National Music Publishers' Association (NMPA) et al, represented by Benjamin Semel, served via ESERVICE at Bsemel@pryorcashman.com

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Signed: /s/ Todd Larson